

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
RIFAT SALEH	:	DTA #817875
for Revision of a Determination or for Refund	:	
of Cigarette Tax under Article 20 of the Tax	:	
Law for the Period Ended October 1, 1998.	:	

Petitioner, Rifat Saleh, 182 Bay 10th Street, Brooklyn, New York 11228, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended October 1, 1998.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 6, 2001 at 10:30 A.M., with all briefs to be submitted by May 31, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel).

ISSUES

I. Whether petitioner was a person who was in possession of or had control of unstamped or unlawfully stamped cigarettes and was, therefore, properly subject to the penalty imposed by Tax Law § 481(1)(b).

II. Whether the penalty imposed against petitioner by the Division of Taxation was excessive and should, therefore, be reduced.

III. Whether, by virtue of the fact that the Notice of Determination issued to petitioner contained an erroneous date of the occurrence of the alleged incident and failed to disclose whether petitioner was being charged with possession or control of *unstamped* or *unlawfully stamped* cigarettes, petitioner's due process rights were violated or his ability to protest the notice was prejudiced, thereby warranting cancellation of the statutory notice.

FINDINGS OF FACT

1. Senior Investigators Gary Rogers and Roderick Williams, employees of the Petroleum, Alcohol and Tobacco Bureau of the Division of Taxation ("Division"), were involved in conducting inspections of locations in the Bay Ridge area of Brooklyn which were suspected of dealing in unstamped or illegally stamped cigarettes when, in the early afternoon of October 19, 1998, they visited the Bayridge Supermarket at 188 Bay Ridge Avenue. When they entered the store, Rifat Saleh ("petitioner") was behind the counter. Another employee, Luis Delacruz, was sweeping the floor and was identified by petitioner as a "helper." The investigators identified themselves, displayed their shields and stated their purpose. Petitioner told the investigators that he was the manager of the store and gave them permission to look around. He stated that the owner, Nasar Alidani, was unavailable. Petitioner was asked by the investigators to provide them with the store's Certificate of Authority, its licenses to sell beer and cigarettes and purchase invoices for the cigarettes; petitioner provided the investigators with everything requested with the exception of the cigarette invoices. He had keys to the store, had access to the cash register and knew the whereabouts of the documents requested by the investigators.

2. Investigator Williams went around the counter and found several packs of cigarettes with Virginia tax stamps adjacent to the display area and found three cartons of Virginia stamped cigarettes under the counter. Investigator Rogers inspected the rear area of the store and in a room adjacent to the bathroom, he discovered a false wall. Inside the wall, he found approximately 240 cartons of cigarettes, some of which contained Virginia tax stamps and others which were unstamped. When asked from whom the store purchased its cigarettes, petitioner replied that its suppliers were Fast Service and Jetro which were local wholesalers of cigarettes.

3. Investigator Williams issued a Notice Of Suspension of Registration as a Retail Dealer of Cigarettes and/or Tobacco Products to Bayridge Supermarket, Inc. d/b/a Bayridge Supermarket. Investigator Rogers placed petitioner under arrest and did an inventory of the cigarettes; a total of 243.7 cartons of unstamped or unlawfully stamped cigarettes were found on the premises. Petitioner was charged with: (1) attempt to evade or defeat the cigarette tax in violation of Tax Law § 1814(a)(2), a class E felony; (2) possession for sale of unstamped or unlawfully stamped cigarettes in violation of Tax Law § 1814(e), a class E felony; and (3) failure to produce cigarette business records in violation of Tax Law § 1814(h), a misdemeanor.

4. On December 2, 1998, in the Criminal Court of the City of New York, County of Kings, petitioner entered a plea of guilty to a misdemeanor attempt to evade or defeat the cigarette tax, a violation of Tax Law § 1814(a)(1), in full satisfaction of all of the original charges. He was sentenced to a conditional charge and a fine totaling \$340.00. Prior to accepting petitioner's plea, Judge Sheryl Parker's questioning of petitioner went as follows:

THE COURT: Mr. Saleh, is it your wish to plead guilty in this matter to a class B misdemeanor?

THE DEFENDANT: Yes, Judge.

THE COURT: It is charged that on October 19, 1998, at the time 2:15 p.m. inside of 188 Bay Ridge Avenue in Kings County that you were the manager of a store at that location and that you had for sale cigarettes which did not have a lawful New York State Tax Stamp on that [sic], and that you were are [sic] offering them for sale without such tax stamp; is that true?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you or forced you to plead guilty to this charge?

THE DEFENDANT: No.

* * *

THE COURT: You understand that by pleading guilty you give up certain rights. You are giving up the right to a trial by judge or jury where the prosecutor would have to prove this case against you beyond a reasonable doubt; you give up your right to confront and cross-examine witnesses who might appear and testify in your behalf and you give up your right to remain silent, do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you discussed all of this with your attorney who's here with you?

THE DEFENDANT: Yes.

5. On May 24, 1999, the Division issued a Notice of Determination to petitioner which assessed penalty in the amount of \$23,300.00. The Notice of Determination indicated that the tax period at issue was for the period ended October 1, 1998 and contained the following explanation: "During an inspection of your premises, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products."

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner contends:

a. Petitioner never told the investigators that he was the manager of the store. He had neither possession nor control of the cigarettes which were in the store; he did not own the cigarettes and derived no benefit from them. He further states that he knew nothing about the more than 240 cartons of cigarettes which were located behind a false wall in a back room of the store;

b. Petitioner entered his plea of guilty to the misdemeanor charge on the advice of his attorney because “it’s easy, it’s very simple” and the pending charges were felonies;

c. The Notice of Determination is fatally defective because it refers to the tax period ended October 1, 1998 when, in fact, petitioner is accused of an incident which occurred after that date, to wit, October 19, 1998. In addition, the notice fails to differentiate between “unstamped” cigarettes, i.e., cigarettes which bear no tax stamp or bear the tax stamp of another state, and “unlawfully” stamped cigarettes, i.e., cigarettes which bear a counterfeit stamp. Petitioner maintains that the Notice of Determination must conform to the requirements of section 3013 of the Civil Practice Law and Rules which provides that statements in a pleading shall be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and material elements of each cause of action or defense.

d. The penalty imposed by the Division is grossly excessive. That penalty, which is the maximum allowable under Tax Law § 481(1)(b), is not warranted under the facts of this case.

7. The Division’s position is as follows:

a. The doctrine of collateral estoppel is applicable to this matter, i.e., petitioner's prior guilty plea in the criminal matter precludes him from challenging the same issue in this civil action;

b. If he is not collaterally estopped from claiming that he was not in possession or control of the unstamped or unlawfully stamped cigarettes, it is clear from the evidence that he was, in fact, in possession or control of the cigarettes;

c. Petitioner was not prejudiced or in any way harmed by the error in the Notice of Determination which incorrectly set forth the period for which the assessment of the penalty was made; and

d. The nature of the crime (the deceptiveness in hiding the cigarettes behind a false wall in a back room) and the number of untaxed cigarettes seized warrant the imposition of the maximum penalty provided for by law.

CONCLUSIONS OF LAW

A. Tax Law § 481(1)(b) provides as follows:

In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person.

B. Petitioner contends that the unstamped or unlawfully stamped cigarettes were not in his possession or under his control. He claims that he did not know about the more than 240 cartons of cigarettes which were hidden behind a false wall in a back room of the Bayridge Supermarket. Petitioner was not the owner of the store and, therefore, he did not own the cigarettes or derive any benefit from them. Moreover, he denies ever having told the investigators that he was the manager of the store.

In response, the Division asserts that petitioner's guilty plea in the criminal matter precludes him from challenging the same issue in this civil action. Citing *Kuriansky v. Professional Care* (158 AD2d 897, 551 NYS2d 695), the Division contends that the doctrine of collateral estoppel applies in this case since the issue before the Division of Tax Appeals is the same issue which was previously adjudicated in the Criminal Court of the City of New York on December 2, 1998.

C. There are two requirements which must be satisfied before the doctrine of collateral estoppel can be invoked: the identical issue necessarily must have been decided in the prior action and be decisive of the present action; and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*Kaufman v. Eli Lilly and Co.*, 65 NY2d 449, 492 NYS2d 584).

The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (*Kaufman v. Eli Lilly and Co.*, *supra* at 456).

On December 2, 1998, in the Criminal Court of the City of New York, County of Kings, petitioner entered a plea of guilty to a misdemeanor attempt to evade or defeat the cigarette tax, a violation of Tax Law § 1814(a)(1). At that time, he was asked by Judge Sheryl Parker if it was true that on October 19, 1998, at 2:15 P.M. inside the store at 188 Bayridge Avenue where he was the manager, he had for sale cigarettes which did not have a lawful New York State tax stamp and that he was offering them for sale without such tax stamp. To this question, petitioner answered, "Yes."

Clearly, when the investigators entered the store on October 19, 1998, petitioner was in possession and control of some cigarettes stamped with Virginia tax stamps. When Investigator Williams went around the counter, he found several packs of cigarettes with Virginia tax stamps adjacent to the display area and also found three cartons of Virginia stamped cigarettes under the counter. However, the penalty which the Division seeks to impose pursuant to Tax Law § 481(1)(b) is a penalty of \$100.00 for each 200 cigarettes (or fraction thereof) *in excess of 2,000 cigarettes* in unstamped or unlawfully stamped packages. In criminal court, petitioner acknowledged only that he had for sale cigarettes which did not have a lawful New York State tax stamp on them and that he offered them for sale without the New York State tax stamp. At no time was petitioner asked nor did he admit that he had for sale and did offer for sale 243.7 cartons of such unstamped or unlawfully stamped cigarettes. Had petitioner so acknowledged that he had for sale and did offer for sale 243.7 cartons, there is no question but that the doctrine of collateral estoppel would preclude petitioner from relitigating this issue in the present matter. Since the Division has, therefore, not sustained its burden of demonstrating the identity of the issues, it is hereby found that collateral estoppel is inapplicable.

D. The Division also asserts that even if petitioner is not collaterally estopped from claiming that he was not in possession or control of the unstamped or unlawfully stamped cigarettes, the evidence in the record indicates that he was, in fact, in possession or control of these cigarettes.

Investigator Gary Rogers credibly testified that petitioner told the investigators that he was the manager of the store. Despite his denial, at the hearing, that he ever told the investigators that he was the manager, in the criminal proceeding on December 2, 1998, petitioner admitted that he was the manager. Petitioner was readily able to locate and produce the documents (except for the

purchase invoices for the unlawfully stamped cigarettes) which were requested by the investigators. He knew the names of the store's cigarette suppliers. He had keys to the store and access to the cash register. Other than a mere claim that he was not the manager and that he did not know about the approximately 240 cartons of cigarettes located behind the false wall in a back room of the store, petitioner has produced no evidence to substantiate these claims.

Testimony or affidavits from the owner of the store or from other employees were not introduced by petitioner nor was any explanation offered for the absence of such corroboration. It is petitioner who bears the burden of proof in this matter (*see*, Tax Law § 471) and he has failed to sustain that burden. Accordingly, it is hereby found that petitioner was a person who was in possession or control of 243.7 cartons of unstamped or unlawfully stamped cigarettes on October 19, 1998 at the Bayridge Supermarket at 188 Bay Ridge Avenue, Brooklyn, New York and, as such, the penalty imposed by the Division pursuant to Tax Law § 481(1)(b) was proper.

E. Petitioner contends that under the facts of this case, the penalty imposed by the Division is grossly excessive. In *Matter of Vinter* (Tax Appeals Tribunal, September 27, 2001), the Tribunal reversed a determination by an Administrative Law Judge which reduced, by 50 percent, the penalty imposed by the Division pursuant to Tax Law § 481(1)(b), noting that:

[t]he imposition of such a penalty was not mandated by law but was a matter within the discretion of the Commissioner. The only limit on the exercise of such discretion was that the amount of the fine could not exceed \$100.00 for each 200 cigarettes or fraction thereof in excess of 2,000 cigarettes in unstamped or unlawfully stamped packages.

Noting that there are no statutory guidelines for the exercise of the Commissioner's discretion in imposing a penalty pursuant to Tax Law § 481(1)(b), the Tribunal stated that it was not necessary for the Division to have considered factors such as the nature, number and degree of the violation prior to imposing the penalty since it is not so mandated by statute or regulation and "it is beyond

the jurisdiction of the Tax Appeals Tribunal to impose such a requirement on the Commissioner when the statute does not provide for it.” (*Matter of Vinter, supra*).

The Tribunal, in *Matter of Vinter*, then went on to point out that it is petitioner’s burden to demonstrate by clear and convincing evidence that the imposition of the penalty by the Commissioner in the amount so imposed was an abuse of discretion. In the present matter, petitioner has not met his burden and is, therefore, not entitled to have the penalty reduced.

F. Finally, petitioner contends that the Notice of Determination is fatally defective and must, therefore, be canceled because it refers to the tax period ended October 1, 1998 when, in fact, petitioner is accused of an incident which occurred on October 19, 1998 and, in addition, because the notice fails to differentiate between unstamped and unlawfully stamped cigarettes, thereby depriving petitioner of the particulars of the charge for which he stands accused. Petitioner’s contention is without merit. In *Matter of Vinter (supra)*, the Notice of Determination indicated that the period at issue was April 1, 1997 rather than the actual date of an inspection by the Division’s investigators of April 9, 1997. The Tribunal, noting the error, concluded that the defect was not sufficient to invalidate the Notice of Determination absent a showing of harm or prejudice to the petitioner. In the present matter, petitioner was arrested and charged in connection with an inspection which occurred on October 19, 1998. He has not shown that he was, in any way, prejudiced by the error in the date on the notice (*see, Matter of Agosto v. Tax Commn.*, 68 NY2d 891, 508 NYS2d 934; *Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 47 NYS2d 892).

The same is true for the failure of the notice to specify whether petitioner was accused of possessing or controlling “unstamped” or “unlawfully stamped” cigarettes. Tax Law § 470(13) provides that a package of cigarettes which bears no tax stamp or bears the stamp of another state

or taxing jurisdiction is considered to be an unstamped package. Petitioner was on the premises when the investigators found cigarettes some of which bore Virginia tax stamps and others which bore no tax stamp. At no time was he ever charged with possession or control of “unlawfully stamped” cigarettes, i.e., packages bearing a counterfeit tax stamp (Tax Law § 470[13]). It must be noted that the penalty imposed by Tax Law § 481(1)(b) is for unstamped *or* unlawfully stamped cigarettes in the possession or control of any person. Petitioner has failed to show that he made any requests for discovery to ascertain the basis of the imposition of the penalty and that such requests were denied by the Division and, further, that he has suffered any harm or prejudice by virtue of the failure of the notice to specify whether he was being charged with possession or control of “unstamped” or “unlawfully stamped” cigarettes.

G. The petition of Rifat Saleh is denied and the Notice of Determination dated May 24, 1999 is hereby sustained.

DATED: Troy, New York
November 15, 2001

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE